UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LIBERTY SOURCE W, LLC AND/OR
TRAFFORD DISTRIBUTION CENTER,
ITS ALTER EGO, AND/OR A SINGLE
EMPLOYER

and

Cases 6–CA–33661
6–CA–33729

FEDERATION OF INDEPENDENT
SALARIED UNIONS

INTERNATIONAL UNION OF ELECTRONIC,
ELECTRICAL, SALARIED, MACHINE AND
FURNITURE WORKERS-COMMUNICATIONS
WORKERS OF AMERICA, LOCAL 601, AFL-CIO

Barton Meyers, Esq.,
for the General Counsel.
John B. Bechtol, Esq.,
(Bechtol, Lee & Eberhardt),
Pittsburgh, Pennsylvania,
for Respondent Trafford
Distribution Center.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on July 19 and 20, 2004. The Federation of Independent Salaried Unions (the Federation) filed the initial charge in case 6–CA–33661 on September 11, 2003, and amended that charge on October 15, 2003, and December 18, 2003. The International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO (the IUE), filed the charge in case 6–CA–33729 on October 21, 2003, and an amended charge on December 18, 2003. On December 30, 2003, the Director of Region 6 of the National Labor Relations Board issued the complaint. The complaint alleges various Section 8(a)(5) and (1) violations arising out the decision of Liberty Source W, LLC (Liberty) to suspend operations and surrender its assets to a creditor, and the subsequent resumption of a portion of Liberty's operations by a newly incorporated entity designated Trafford Distribution Center (Trafford). The complaint alleges that Liberty and Trafford are alter egos and/or a single employer and that they violated Section 8(a)(5) and (1) of the National Labor Relations Act in by, inter alia, failing to bargain before ceasing operations, terminating the employment of represented individuals without bargaining, and setting new wages and terms and conditions of employment for recalled workers. Among the other allegations are that Liberty and/or Trafford violated Section 8(a)(5) and (1) when, after terminating unit employees, they

failed to pay those employees severance benefits, back wages, accrued vacation pay, and other monies provided for under the applicable collective bargaining agreements. Trafford filed a timely answer in which it denied that Liberty and Trafford were either alter egos or a single employer, and also denied that Trafford committed any of the violations alleged in the complaint. No answer was filed by any person or entity purporting to represent Liberty.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Trafford, I make the following Rulings, Findings of Fact, and Conclusions of Law.

General Counsel's Motion For Partial Default Judgment

At the start of trial, the General Counsel moved that all allegations regarding Liberty be deemed admitted because Liberty had not filed an answer to the complaint. Counsel for Trafford (Liberty's alleged alter ego) opposed the motion and I took the matter under advisement. I now grant the motion to the extent indicated below.

The record in this case shows that the complaint was served on Liberty at its principal office and place of business on December 31, 2003 and January 6, 2004.[1] The file contains return receipts showing that the complaint was received. It is undisputed that no party purporting to represent the interests of Liberty ever filed an answer to the complaint. The record also shows that the complaint was received by Trafford — an entity that is doing business at the same address where Liberty operated and whose managers had all been managers of Liberty. The office of John B. Bechtol, Esq. — the attorney who appeared in this proceeding on behalf of Trafford — also received the complaint. Trafford answered the complaint in a timely fashion. In its answer, Trafford explicitly denied that it was responding on behalf of Liberty, and on that basis refused to respond to certain allegations regarding Liberty. However, Trafford's answer was not consistent in this regard, and it explicitly denied, upon "knowledge and belief," other allegations relating to Liberty.

At trial, no counsel claiming to represent Liberty was present to take a position regarding the General Counsel's motion. However, Attorney Bechtol was present and, while continuing to maintain that he represented only Trafford, opposed the General Counsel's motion regarding Liberty, and made various representations about the status of that entity. He stated that Liberty had been given over "lock, stock, and barrel," to the company's principal secured creditor — Independence Community Bank (the Bank).[2] Bechtol stated that Liberty had been "in essence liquidated," and that the Bank was the "interested party" on behalf of Liberty. The General Counsel countered that the Bank was simply a creditor of Liberty, which had never operated the business or become an employer of Liberty's employees. Counsel for the General Counsel stated that Liberty had made the decision to surrender its assets to the Bank, and that the Bank

[1] Section 102.113(a) of the Board's Rules and Regulations provides that "Complaints . . . shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served."

[2] I consider this characterization suspect given the evidence, discussed below, that five days after Liberty's assets were surrendered to the Bank, Liberty\Trafford managers resumed the company's warehouse\fulfillment operation without any participation by Bank officials. The Bank never operated Liberty or continued any of its businesses, except to make an effort to collect on some of the company's outstanding accounts.

had not initiated the surrender. In its brief the General Counsel accurately notes that there is no record evidence that Liberty has been dissolved as a corporate entity.

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint will be deemed admitted if no answer is filed within 14 days from service of the complaint, unless good cause is shown. See also *OK Toilet and Towel Supply, Inc.*, 339 NLRB No. 142 (2003), slip op. at 1. In addition, a complaint allegation is deemed to be admitted pursuant to Section 102.20 if an answer is filed, but that answer does not deny or explain the allegation, unless the answer states that the party is without knowledge. Regarding Trafford's argument based on Liberty's financial status, the Board has long held that liquidation does not shield a respondent from the obligation to file a timely answer. See *Valiant Metal Products*, 244 NLRB 1049 (1979). Similarly, the Board has refused to relieve respondents of the obligation to file an answer when those respondents have ceased operations or filed for bankruptcy. *OK Toilet and Towel*, 339 NLRB No. 142 (2003), slip op. at 1-2; *Miami Rivet of Puerto Rico*, 307 NLRB 1390 at 1391 and n.2 (1992); *Community Health Plan*, 306 NLRB No. 10 (1992); see also *Holt Plastering, Inc.*, 317 NLRB 451, 451-52 (1995) (Board holds that employer was not excused from filing an answer to compliance specification, even though employer notified Board it had "ceased operations and liquidated the plant facilities"). Even assuming that Liberty had been liquidated, I conclude that "good cause" has not been shown for Liberty's failure to file an answer to the complaint.

Based on Section 102.20 and the Board precedent cited above, I deem the complaint allegations regarding Liberty to be admitted, to the extent that those allegations are not denied or explained in the answer that Trafford filed.

Findings of Fact

I. Jurisdiction

During the 12-month period ending August 31, 2003, Liberty, a corporation with an office and facility in Trafford, Pennsylvania, (the facility) conducted printing, web design, and warehouse and distribution operations. In conducting those operations during that period, Liberty received at the facility goods valued in excess of $50,000 directly from points outside Pennsylvania, and provided goods and services valued in excess of $50,000 to customers located outside Pennsylvania. During the same period, Liberty purchased and received at its facility goods valued in excess of $50,000 from other enterprises located within Pennsylvania, each of which enterprises had received these goods directly from points outside Pennsylvania. Liberty admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Since commencing its operations on September 8, 2003, Trafford, a corporation operating at the same facility in Trafford, Pennsylvania, has conducted warehouse and distribution operations. In conducting these operations, Trafford has provided services valued in excess of $50,000 to Heinz, U.S.A., an enterprise within Pennsylvania, which is directly engaged in interstate commerce. On a projected basis for the 12-month period commencing on or about September 13, 2003, Trafford will provide services valued in excess of $50,000 to Heinz, U.S.A. Trafford admits, and I find, that at all material times since on or about September 13, 2003, Trafford has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Trafford and Liberty admit, and I find, that the Federation and the IUE (the Unions) are both labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Until September 3, 2003, Liberty provided customers with printing services, internet-related services (also referred to as "e-source" services), and warehouse\fulfillment services, [3] at its facility in Trafford, Pennsylvania. By far, the greatest portion of Liberty's business was generated by the printing operation. In the months leading up to September 3, about 80 to 90 percent of Liberty's business was generated by the printing operation, about 5 percent by the e-source operation, and about 1 to 2 percent by the warehouse\fulfillment operation.[4] Of the company's 110 employees, most — 80 to 85 — worked for the printing operation. The printing employees included pressmen, press operators, bindery and refinishing workers, and customer service estimators. Approximately six employees worked in the warehouse\fulfillment operation as warehousemen who received materials, picked and packed items kept in the warehouse, and shipped products. Shortly before September 3, Liberty obtained new warehouse\fulfillment business from the Heinz Company, and it was expected that this work would triple the total volume of the Respondent's warehouse\fulfillment business; however, that would still leave the warehouse\fulfillment operation with less than one-tenth the sales volume of the printing business.

Joseph Wortley (J. Wortley) owned Liberty. Richard Carmody was the company's president, and he also served as chief spokesperson for the company in contract negotiations and other dealings with the Federation and the IUE.[5] Patrick Manderfield was Liberty's chief financial officer, Leonard Manganello its vice-president of operations, Ronald D'Andrea a manager, and Nellie Mae Shenefelt its human resources manager. Another of J. Wortley's companies — Liberty Properties at Trafford, LLC (Liberty Properties) — owned the Trafford facility from which Liberty conducted its operations. At all material times, the Federation has been the collective bargaining representative for a unit composed of salaried employees of Liberty, and the IUE has been the collective bargaining representative for a unit composed of hourly and maintenance employees of Liberty. The Federation and the IUE had collective bargaining agreements with Liberty, and those contracts, with the extensions agreed to in writing by the parties, did not expire until January 31, 2004.

The 2 years leading up to September 3, 2003, were not good ones for Liberty financially, and the company was having difficulty paying several of its suppliers. J. Wortley tried to refinance Liberty's loan with its principal creditor, Independence Community Bank, in order to obtain a lower interest rate, but those efforts failed. A series of disagreements between J. Wortley and the Bank led to the deterioration of their relationship and in July 2003 the Bank filed a legal action against Liberty Properties, the J. Wortley company that owned the facility where Liberty was operating. J. Wortley also had a contentious relationship with one of its vendors, and, on August 27, 2003, that vendor obtained a federal court judgment of $291,585.25 against Liberty.

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[3] Liberty's warehouse\fulfillment business consisted essentially of: receiving material from customers and storing that material at the Trafford facility; delivering, or arranging for the delivery of, the material to entities that ordered it; and invoicing those entities.

[4] These percentages, which are based on the testimony, Tr. 32-35, are only approximations, and this presumably accounts for the fact that they do not add up to 100 percent. There was no evidence that Liberty was engaged in any other types of business.

[5] Carmody also oversaw the operations of other companies that J. Wortley owned.

B. Cessation of Liberty's Operations

On Wednesday, September 3, 2003, J. Wortley, through counsel, notified the Bank that Liberty was surrendering its collateral.[6] Under Liberty's loan agreement with the Bank, that collateral included all of the company's equipment, inventory, accounts receivable, contracts, and other personal property. The loan agreement also provided that Liberty "remain[ed] liable" for the performance of each contract it had entered into with third parties" and that "[t]he Bank shall not have any obligation or liability under any Contract [of Liberty] . . . nor shall the Bank be required or obligated in any manner to perform or fulfill any of the obligations of the Borrower under or pursuant to any Contract." General Counsel's Exhibit (GC Exh.) 9 at Page 13, para 3.2(a). On September 3, Carmody informed Manderfield, Manganello, and D'Andrea about the surrender of collateral and directed them to shut down Liberty immediately. After the meeting, Manganello began contacting Liberty's employees to advise them not to return to work the next day.

Neither J. Wortley nor Carmody, nor anybody else from Liberty, gave the Federation or the IUE advance notice that J. Wortley would be surrendering the company's assets, ceasing operations, and terminating employees, nor were the Unions given an opportunity to negotiate over those actions or their effects. George Kundrick, a longtime employee of Liberty and a Federation representative who helped negotiate the contract, did not find out anything about J. Wortley's actions until 8 pm on September 3, when Manganello called him and stated that J. Wortley was having problems with the Bank and that the facility would not be open September 4. The next day, Manganello called Kundrick again and informed him that the plant would be closed indefinitely. Damian Testa, the Federation's president, did not find out that the plant

[6] That notice read as follows:

NOTICE OF SURRENDER OF COLLATERAL

TO: INDEPENDENCE COMMUNITY BANK

THE BORROWER, LIBERTY SOURCE W, LLC, hereby notifies the secured creditor, Independence Community Bank, that it is surrendering its collateral covered by the liens of Independence Community Bank located in Pittsburgh, Pennsylvania to the bank for disposition pursuant to the provisions of the Uniform Commercial Code of Pennsylvania and to the provisions of the loan documents between Independence Community Bank, as Lender and Secured Creditor, and Liberty Source W, LLC.

You are further notified that it is your obligation under the loan documents and under the Uniform Commercial Code to take possession of this collateral, protect it and maximize its value to be applied against the debt that is the subject of the security interest.

Dated this 3 day of September, 2003.

LIBERTY SOURCE W, LLC

BY [signed]
Richard Carmody, President

would close until Kundrick told him. Richard "Rick" Zahorchak, president of the IUE and an employee of Liberty, found out that the company was closing on September 3 at about 10 pm, when Manganello contacted him by phone with instructions not to report for work until further notice. Manganello informed Zahorchak that Carmody told him to close the operation.

After Carmody informed Manderfield that J. Wortley was surrendering Liberty's assets to the Bank, Manderfield contacted Robert Craig, an official with the Bank, for guidance about how to proceed. Craig responded that he was caught off-guard by J. Wortley's actions and had to consult with the Bank's attorneys before he could give Manderfield any guidance. Manderfield and the Bank had discussions about the possibility of resuming operations, perhaps by selling Liberty to an interested buyer, but on September 8 or 9, 2003, Manderfield was informed that the Bank would not operate the business.[7] There is no evidence that the Bank ever operated Liberty, although it hired one former Liberty employee, Becky Quinlin, to help it collect amounts that Liberty was owed by its customers.

C. Resumption Of Warehouse\Fulfillment Operation And Creation of Trafford

In the meantime, the owner and managers of Liberty considered whether it would be practical to resume some element of the company's operation at the facility. On September 5, 2003, — 2 days after surrendering the company's assets to the Bank — J. Wortley held a telephone conference with Carmody, Manderfield, Manganello, and D'Andrea. During that conference, J. Wortley raised the possibility that the warehouse\fulfillment business could be a viable operation on its own. He told Manderfield, Manganello, and D'Andrea that if they

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[7] The loan agreement between Liberty and the Bank provides that, in the event of a default, the Bank has numerous rights, including: to seize and sell Liberty's assets; to "use, operate, manage and control" those assets "in any lawful matter"; and to "maintain, repair, renovate, alter or remove" the company's assets. Trafford has identified no provision of the agreement that gives the Bank the right to do any of those things if Liberty does not default, or which gives Liberty the right to decide for the Bank which of those options, if any, the Bank will exercise in the event of default. Certainly, the agreement does not give Liberty the right to impose on the Bank a duty to operate the company or assume Liberty's contractual obligations as an employer. To the contrary, the loan agreement specifically states that none of its provisions make the Bank liable for performance of Liberty's contracts. GC Exh. 9 at Page 13 (Section 3.2(a)). Trafford does not claim, and the record does not show, that the Bank had requested that Liberty surrender its assets, or notified Liberty that the company was in default at the time Liberty surrendered its assets. Indeed, the evidence was that the responsible Bank official indicated that he was caught completely off-guard by J. Wortley's decision to surrender Liberty's assets.

The loan document includes among the circumstances that constitute "default events," the entry of a judgment (or aggregate judgments) against Liberty of more than $50,000 that is "not fully covered by insurance, or a warrant of attachment," where such judgment is not discharged or stayed pending appeal within a period of 60 days or 10 days for judgments totaling over $100,000. As discussed above, the record shows that on August 27, 2003, a judgment was entered against Liberty in the amount of $291,585.25. However, the record does not show that the Bank could, or did, consider that judgment to be a default event. At the time that Liberty notified the Bank of the surrender of assets, the 10-day period following entry of the judgment had not lapsed. Moreover, the entry of such a judgment does not constitute default unless it is not covered by insurance, has not been discharged, and has not been stayed pending appeal -- requirements that are not established by the record before me.

prepared a workable business plan to continue the warehouse\fulfillment business he, or his family, would finance it and set up a new company. That same day, Manderfield, Manganello, and D'Andrea formulated a business plan that discussed anticipated revenues, staffing needs, pay and benefits, and rent on the location. J. Wortley's wife, Barbara Wortley (B. Wortley), made a financial contribution of $25,000 to the business and also a loan of about $17,000, and was designated the owner of the enterprise. In addition, J. Wortley established a special financing arrangement for the business under which a bank in New Jersey would advance money to the company on the basis of invoices that the company issued to customers, even though the customers had not yet paid what they owed. The following Monday, September 8, 2003, the warehouse\fulfillment operation was resumed by this provisional entity. On September 23, 2003, the resumed warehouse\fulfillment operation was incorporated as Trafford.

The rent on the property occupied by Trafford, which was due to J. Wortley's company — Liberty Properties — was $12,000 per month in 2003, and $10,500 a month in 2004. For at least some period of time, Trafford did not actually pay the rent to Liberty Properties, but, apparently, accrued an obligation to do so. The rent covered the entire premises of Liberty's operation, not just the portion dedicated to the warehouse\fulfillment operation. Trafford has generated some revenues by renting out portions of the facility that it does not require for the warehouse\fulfillment operation.

In October 2003, Trafford reached an agreement with the Bank to buy the equipment, formerly owned by Liberty, that was necessary to the warehouse\fulfillment operation, although it does not appear that the sale was finalized until May 2004.[8] Trafford Distribution Center Exhibit (TDC Exh.) 6. Trafford's letter offering to purchase the equipment for $27,000, indicates that it was not proposing to pay that amount to the Bank, but rather to take the equipment in exchange for $27,000 the Bank owed Trafford "for services rendered . . . by [Trafford] employees Len Manganello and Pat Manderfield and for the use of space by [the Bank] for the period September 4, 2003, through November 30, 2003." TDC Exh. 4. The record does not clarify what services Manganello and Manderfield had rendered to the Bank or why the Bank owed Trafford for space. Liberty's printing and internet businesses were never resumed, and the Bank sold the rest of Liberty's equipment to other buyers at an auction in November 2003. The record does not show that Liberty was ever formally dissolved as a corporate entity, or, if so, when such action took place. Indeed, no party in this proceeding has alleged that a formal dissolution has taken place. Likewise, there is no evidence, or allegation, that Liberty filed for bankruptcy.

When Trafford restarted the warehouse\fulfillment operation, all of its initial customers were customers of Liberty. During the period from September 2003 to May 2004, the vast majority of Trafford's business—over 98 percent—came from customers that had been customers of Liberty prior to September 3. At the same time, many of Liberty's customers never became customers of Trafford since those customers had used Liberty for printing and e-source services, neither of which Trafford provides. In March or April 2004, Trafford began to augment its revenues by leasing out portions of the facility to a company called AGX International. The leasing business is one that Liberty apparently had not been involved with, and it accounts for less than one percent of Trafford's business.

[8] Apparently before the sale took place, Trafford was already using much, or all, of that equipment. The record does not explain on what basis Trafford was using equipment that Liberty had surrendered to the Bank, but which Trafford had not yet purchased from the Bank.

D. Trafford Disclaims Liberty's Collective Bargaining Agreements And Refuses To Recognize Unions

Over the weekend of September 6 and 7, Manderfield, Manganello, and D'Andrea hired employees to resume the warehouse\fulfillment operation. The employees were contacted by Manganello directly, and selected without regard for the seniority provisions of Liberty's contracts with the Federation and the IUE.[9] Trafford established new wage rates, benefits levels and other conditions of employment for these employees without notifying, bargaining with, or obtaining the consent of, the Federation and the IUE. Trafford paid the employees $12 per hour — less than they had had been making with Liberty under the contracts — and informed them that the company had not made a decision about whether to provide medical insurance.[10] Shenefelt, who had been human resources manager with Liberty, was hired to perform human resources functions for the resumed warehouse\fulfillment operation. On Monday, September 8, employees who had been hired over the weekend appeared for work and, along with the managers, they resumed the warehouse\fulfillment operation at the same location where Liberty had been operating. All but two of the 10 to 12 people Trafford hired to begin work during the week of September 8 had been employed by Liberty as of September 3. Four of Trafford's new warehousemen had been operating printing presses until September 3, and one had been a subcontractor who made deliveries for Liberty. One individual who had been the customer service representative associated with the warehouse\fulfillment operation prior to September 3, was hired by Trafford to continue performing customer service work. One of the hirees had been a warehouse worker before the suspension of operations. The managers and employees of Trafford were called-upon to perform a more varied, flexible, set of duties than individuals working for Liberty had generally done prior to September 3. For example, Manderfield had to perform accounting work himself, rather than just supervising others who did that work. Prior to September 3, the duties of warehouse employees included receiving stock, putting stock away, performing inventory related tasks, picking and pulling materials to fill orders, packing and preparing to ship orders, and operating shipping computers. Beginning on September 8, warehouse employees continued to perform those duties, and, in addition, performed janitorial and maintenance work.

After receiving reports that people were again working at the Liberty facility, Zahorchak spoke with Manganello on September 10. Manganello confirmed that the company had decided to continue the warehouse\fulfillment element of Liberty's business, and that there were people at the plant working to complete those orders. Zahorchak asked Manganello about the applicability of the IUE contract, and Manganello told him that the question should be directed to

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[9] The Federation contract states that "[i]n all cases of layoffs, seniority shall first be given consideration and employees will be permitted to displace other less senior employees but only if the employee can perform the duties of the job." GC Exh. 2 at Article VII, Section 6. The Federation contract also provides that when vacancies are filled during a layoff employees within a department "shall be recalled by seniority in the reverse order of layoff." Id. at Section 5. The IUE contract provides that "in all cases of layoffs due to decreasing forces, accumulated length of service will govern, and employees will be permitted to displace other employees only if the employee can perform the duties of the job." GC Exh. 4 at Section XIII(D)(1). The IUE contract also indicates that laid-off employees will fill subsequent openings based on seniority. Id. at XIII(B) and (F).

[10] Trafford ended up providing the employees with health insurance coverage under the same health plan that provided their insurance prior to September 3. This coverage was continued for a period of approximately 3 months, and then Trafford obtained a different health insurance plan for the employees.

Carmody. Testa spoke with Carmody on September 10 and Carmody told him that there would be no recall of Federation employees and that the company was "not going to recognize the Union."

E. Former Employees Of Liberty Do Not Receive Severance, Back Wages, and Accrued Vacation Benefits Provided For Under Contracts With Liberty

Under the contracts that Liberty had with the Federation and IUE, the terminated employees were entitled to various severance benefits. Those benefits included severance pay and payments for accrued vacation days neither of which were ever paid to the employees. Nor were the former employees paid for the work they performed on September 1, 2, and 3 — the days that employees worked leading up to J. Wortley's surrender of the Liberty assets. The Bank did make contributions to the employees' retirement fund equal to the amount of employee contributions that had already been deducted from paychecks, but which had not yet been remitted to the fund.

On September 16, Carmody met with Testa, Zahorchak, Kundrick and other union officials at the IUE office. Carmody told the union officials that J. Wortley was having trouble with the bank and that the company had been involved in a number of "financial disagreements," including one with a vendor that had led to a judgment against the company. Carmody stated that J. Wortley had decided to turn the assets of the printing business over to the Bank. He stated that partners of J. Wortley's would continue with the warehouse\fulfillment operation, at the same location, using a new company called Trafford Distribution Center. According to Carmody, J. Wortley himself would have no part in the new company, which was to be managed by Manderfield, Manganello and D'Andrea. When a union official asked why the recall provisions of the IUE contract had not been followed with respect to staffing the resumed warehouse\fulfillment operation, Carmody responded that "Trafford . . . had every right to form a new business and hire new employees without union representation." Regarding benefits due under the contract to employees who had formerly worked for Liberty, Carmody stated that he could not "make any promises" that those employees would receive severance pay, accrued vacation pay, or back wages, but that he believed outstanding medical claims would be paid, and that every effort was being made to fully fund the employees' retirement plan. One of the union officials asked about filing a grievance and Carmody stated, "I am not accepting a grievance," and opined that "There is no company to file a grievance against."

On October 15, 2003, Robert Wentroble, assistant to the IUE president, sent a letter to Carmody initiating the grievance procedure and demanding that the employees represented by the IUE receive all outstanding benefits — including wages, accrued vacation pay, and sick day pay. Carmody responded with a letter, dated October 24, 2003, in which he expressed a willingness to meet with Wentroble, but stated that he no longer had any affiliation with Liberty or controlled any of its assets. He stated that Liberty was now "owned" by the Bank. In a letter to Carmody, dated November 4, 2003, Testa stated that Liberty "and its alter ego, Trafford" had abrogated their agreement with the Federation by, inter alia, ceasing the printing operations, terminating employees without regard for seniority, and failing to pay terminated employees the severance benefits provided for under the contract. Carmody responded with a letter dated November 6, 2003. As in his October 24 letter to Wentroble, Carmody expressed a willingness to meet, but stated that Liberty was now owned by the Bank and that he was no longer affiliated with it and did not control any of its assets.

F. The Complaint Allegations

The complaint alleges that Liberty and Trafford are alter egos and/or a single employer and that they violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to bargain with the Federation or the IUE over the effects of its actions before: ceasing operations; transferring assets to Liberty's creditor; terminating the employment of individuals represented by the Federation and the IUE; and forming Trafford to continue a portion of Liberty's operations. The complaint further alleges that Liberty and Trafford violated Section 8(a)(5) and (1) by: failing to bargain with, or obtain the consent of, the Federation and the IUE before refusing to pay the terminated employees severance pay, accrued vacation pay, health care benefits, employee security and protection plan benefits, and commissions due pursuant to the applicable collective bargaining agreements; failing to remit monies deducted from employees' pay to the appropriate 401(k) trust funds pursuant to the applicable collective bargaining agreements; recalling Federation and IUE workers in a manner contrary to the seniority provisions of the applicable collective bargaining agreements; refusing to recognize and bargain with the Federation and the IUE when it resumed the warehouse and distribution operations; and, refusing to continue or adhere to the wage rates, benefit levels and other terms and conditions of employment set forth in the applicable collective bargaining agreements when it recalled employees for the resumed warehouse and distribution operation.

III. Analysis and Discussion

A. Alter Ego Status

The General Counsel alleges that Trafford is an alter ego of Liberty, and therefore, is required to comply with Liberty's collective bargaining agreements and to recognize and bargain with the Unions representing Liberty employees. It is "well settled that an employer cannot evade its obligations under the Act by forming what appears to be a new company but is in fact a 'disguised continuance' or alter ego of the old company." *Mar-Kay Cartage*, 277 NLRB 1335, 1340 (1985), enfd. 822 F.2d 1089 (6th Cir. 1987). In order to decide if two facially independent employers are alter egos, the Board considers whether the two entities have substantially identical ownership, management, supervision, business purposes, operation, equipment and premises, and customers. See *Goldin-Feldman, Inc.*, 295 NLRB 359, 370-71 (1989); *Ford Bros.*, 294 NLRB 107, 139 (1989); *Advance Elec*. 268 NLRB 1001, 1002 (1984), enfd. 748 F.2d 1001 (5th Cir. 1984), cert. denied 470 U.S. 1085 (1985); *Fugazy Continental Corp.*, 265 NLRB 1301, 1301–02 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984); *Crawford Door Sales Co*., 226 NLRB 1144 (1976). The Board also looks to "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act." *Fugazy*, 265 NLRB at 1302. No single one among these factors is determinative of alter ego status and not all the indicia need be present for the Board to conclude that a finding of alter ego status is appropriate. See, e.g., *Standard Commercial Cartage, Inc.*, 330 NLRB 11, 13 (1999), *MIS, Inc*., 289 NLRB 491, 491-92 (1988); *Fugazy*, 265 NLRB at 1301. Based on my consideration of the evidence in this case, as viewed through the prism of the factors articulated by the Board, I conclude that Trafford is an alter ego of Liberty.

As discussed above, Trafford is wholly owned by B. Wortley, the wife of J. Wortley, the sole owner of Liberty. The Board has repeatedly held that substantially identical ownership is established where the two enterprises are owned by members of the same family. Thus, in *Industrial TurnAround Corp.*, 321 NLRB 181,185 (1996), enfd. in relevant part 115 F.3d 248, (4th Cir. 1997), common ownership was found where, as here, the alleged alter ego was owned in its entirety by the wife of the sole owner of the original company. Indeed, the Board has found substantial identity of ownership when members of the same family have stock ownership

in the two enterprises, even if such ownership does not account for all the stock of both entities, or is divided among a number of family members. G*oldin-Feldman, Inc.*, 295 NLRB at 372; *Mar-Kay Cartage*, 277 NLRB at 1341; *Advance Electric*, 268 NLRB at 1004; *I.M. Tanaka Construction*, 249 NLRB 238, 241 fn. 29 (1980), enfd. 675 F.2d 1029 (9th Cir. 1982).

Furthermore, in this case, the surrounding circumstances strongly suggest that the decision to designate J. Wortley's wife, rather than J. Wortley himself, as the owner of Trafford did not result in a true transfer of control. As the General Counsel points out in its brief, "there is no evidence in the record that Barbara Wortley ever played any active role whatsoever in the operations of [Trafford], while there is ample evidence that Joseph Wortley, Jr., both oversaw the establishment of that company and continued involvement in its operations thereafter." Indeed, it was J. Wortley who initiated the discussions with Liberty's managers about the possibility of continuing the warehouse\fulfillment operation using a new company and proposed that "he or his family would finance that and set up a new company." Then J. Wortley arranged for a bank to provide special financing based on the company's unpaid accounts receivable. Similarly, it was J. Wortley, not his wife, who discussed the shape the new business would take, and the Wortley family's involvement, with Manderfield, Manganello and D'Andrea. In addition, J. Wortley's real estate company, which owned the premises where Trafford did business, did not actually require the new company putatively owned by his wife to make payments due for rent during the first months of operation. Those payments were deferred and the record does not show that they were ever made. In determining whether common ownership exists, "the Board does not view legal ownership in a vacuum, but instead looks to the totality of the circumstances to determine where the real control exists," *East Tennessee Packing Co.*, 270 NLRB 520, 524 (1984). Here the totality of circumstances confirms that the real control of Trafford was with J. Wortley, not his wife. A strong showing of common ownership of Liberty and Trafford has been made.

The record also establishes that Trafford and Liberty had substantially identical management and supervision. Three of Liberty's four managers — Manderfield, Manganello, and D'Andrea — became the management team at Trafford. Nellie Mae Shenefelt who had responsibility for human resources matters at Liberty, also performed those duties for Trafford. Carmody, who had been Liberty's president, did not become a manager of Trafford; however the record shows that, even while Liberty existed, Carmody had overseen multiple other companies for J. Wortley, calling into question the extent of his involvement in the day-to-day, hands on, management of Liberty. At any rate, most of the management team that ran Liberty became managers of Trafford, and every one of Trafford's managers had been a Liberty manager on September 3. This constitutes a strong showing of substantial identity in management.[11]

The question of whether Liberty and Trafford had substantially identical business purposes and operations is a closer one. On the one hand, the warehouse\fulfillment operation had been a small portion of Liberty's overall business and operation. On the other hand, Trafford's initial business consisted entirely of continuing Liberty's warehouse\fulfillment component. Moreover, Liberty's warehouse\fulfillment operation remained complete and it functioned during the transition from Liberty to Trafford without a significant hiatus. *Goldin-Feldman, Inc*. 295 NLRB at 374 (alter ego status found where, inter alia, there was no hiatus between cessation of operations by original company and commencement of operations by new

[11] No party has claimed that either Liberty or Trafford had supervisors in addition to their management teams. Thus it appears that the substantially identical management also constitutes substantially identical supervision.

company); *MIS, Inc.*, 289 NLRB at 491 (in determining whether enterprise is alter ego, Board considers whether there has been a hiatus in operations). The record shows that on September 8, Trafford simply took over the same work, on the same orders, for all the same customers that Liberty's warehouse\fulfillment operation had serviced until September 3.

The Board has found alter ego status under circumstances, such as those at issue here, where only a portion of the original company's business is transferred to the new enterprise. See *Standard Commercial Cartage, Inc.*, 330 NLRB at 14; *Eckert Fire Protection*, 332 NLRB 198, 201 (2000); *Industrial TurnAround Corp*., 321 NLRB at 187. Still I am given pause because the discrete operation within Liberty that survives in the form of Trafford represented a small element of Liberty's overall business. Neither party has identified any decisions where the Board has considered whether under such circumstances substantial identity of business purpose and operation exists for purposes of the alter ego analysis. Roughly analogous precedent does exist, however, in the context of successorship cases. In those cases, the Board has found sufficient commonality of ownership where even a small portion of the original company's business is transferred to the new enterprise, but a majority of the new enterprise's employees are from the predecessor's bargaining unit. In *The Bronx Health Plan*, 326 NLRB 810, 812 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999) (Table), for example, successor status was found even though the new entity was engaged in a somewhat different type of business than its predecessor and its employees consisted of less than six percent of the predecessor's employee unit. Similarly, in *Lincoln Park Zoological Society*, 322 NLRB 263, 265 (1996), enfd. 116 F.3d 216 (7th Cir. 1997), successorship status was found when the new entity took over only one of the predecessor's 100 locations and only about 3 percent of its complement of unit employees. The portions that Trafford assumed of Liberty's business and workforce were at least as substantial as those taken over by the successors in *Bronx Health* and *Lincoln Park*. Moreover, a clear majority of Trafford's employees came from the Liberty bargaining units. Given the facts and law regarding the issue, I conclude that a showing has been made that Trafford and Liberty had substantially identical business purposes and operations.

The record also shows substantial identity of equipment and premises. Indeed, Trafford was renting the very same premises that Liberty had occupied until September 3. The equipment that Trafford was using was the exact same equipment that Liberty's warehouse\fulfillment operation had used. Regarding customers, the evidence shows that all of Trafford's initial customers were Liberty customers. During the first 8 month's of Trafford's existence, the vast majority of its revenues, over 98 percent, were generated from warehouse\fulfillment customers that had been Liberty's warehouse\fulfillment customers until September 3. Most of the customers for Liberty's warehouse\fulfillment operation continued on as customers of Trafford after September 3. I conclude that the warehouse\fulfillment operation had substantially the same customers before and after the transfer of that operation from Liberty to Trafford.

The final consideration is "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act." *Fugazy*, 265 NLRB at 1302. As with the other indicia, a showing of improper motive is not necessary to a finding of alter ego status. *A&P Brush Manufacturing Corp., et al*., 323 NLRB 303, 309 (1997); *Johnstown Corp. and/or Standyne Inc.*, 313 NLRB 170, 171 (1993), remanded 41 F.3d 141 (3rd Cir. 1994), on remand 322 NLRB 818 (1997)**.** Regarding the question of motivation, I begin by observing that I consider it implausible that J. Wortley would sacrifice the printing and e-source operations that constituted over 90 percent of Liberty's business for the purpose of freeing the warehouse\fulfillment operation from its labor law responsibilities. As Respondent's counsel suggested during trial, that would not be the tail wagging the dog, but the "tip of the tail" wagging the dog. However, J. Wortley's decision to create a new business entity,

i.e. Trafford, as the vehicle for continuing the warehouse\fulfillment business, rather than continuing to use Liberty for that purpose could have been motivated by a desire to avoid labor law responsibilities, even if the decision to cease Liberty's other operations was not. Compare *Martin Bush Iron & Metal*, 329 NLRB 124 (1999) (even though cessation of original company's operations was motivated by purpose legitimate under the Act, alter ego status found where manner in which new company resumed operations was motivated by a desire to avoid labor law responsibilities). Liberty's labor law responsibilities were substantial, and included the obligation to provide laid-off employees with the previously bargained-for severance benefits, accrued vacation pay and backpay, as well the responsibility to provide the retained unit employees with the bargained-for wages, and terms and conditions of employment.

There is little in the record to show that the decision to cease operating as Liberty and continue the warehouse\fulfillment operation in the form of a new entity, was done for legitimate reasons. J. Wortley did not testify to state the reasons for these actions; nor did Carmody or B. Wortley. Rather the Respondent relied on double hearsay — testimony by witnesses about what Carmody told them that he had been told by J. Wortley. I consider that hearsay testimony an unreliable indicator of J. Wortley's motives and, in any case, general and unhelpful regarding the reasons for J. Wortley's decision to cease operating as Liberty. On the other hand, I believe the record does provide some basis for believing that Trafford was created for illegitimate reasons. I note, first, the transparent ploy of designating B. Wortley, rather than J. Wortley, as the owner of Trafford. As discussed above, control continued to rest with J. Wortley, not his wife, after Liberty ceased to operate and Trafford was formed. The Respondent has provided no legitimate reason for this ruse and it is hard to explain absent a desire to avoid the consequences that might follow from acknowledging that J. Wortley controlled both entities. I also believe that some evidence of a motive to avoid labor law obligations is provided by Carmody's refusal to accept or process grievances or otherwise acknowledge his responsibilities as the president of Liberty, or the responsibilities of Liberty to its former employees. Further evidence of anti-union motivation is provided by the failure of Liberty's management to notify the Unions of the decision to suspend Liberty's operations and surrender its assets to the Bank, and its failure to bargain with the Unions over the effects of those actions on unit employees. These decisions were made while Liberty was still operating and, as I will discuss below, constitute violations of the Act.

I also believe that it is appropriate to draw an adverse inference from the failure of J. Wortley and B. Wortley, to testify about the purposes motivating the decision to create a new company to carry on the warehouse\fulfillment operation, instead of continuing that operation as Liberty. The Respondent did not claim that the Wortleys were unavailable or otherwise explain their failure to testify. It is clear that the actions undertaken by the Wortleys to continue the warehouse\fulfillment operation using the new entity, Trafford, rather than through Liberty, would be expected to result in a benefit to the employer by relieving it of very substantial obligations under the Act and existing labor contracts. Yet the Wortleys did not testify to deny that these concerns motivated them. Since it can reasonably be assumed that the Wortleys were favorably disposed towards the companies they owned, I believe it is appropriate, given the failure of either one to testify about their motives, to draw an adverse inference about those motives. *International Automated Machines*, 285 NLRB 1122, 1122-23 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) (Table). To sum up, the evidence shows that J. Wortley closed the warehouse\fulfillment business he owned late on a Wednesday, and resumed that warehouse\fulfillment business on the following Monday as a new enterprise at the same location with the same clients, and essentially the same managers, but without recognizing the Unions or applying the existing collective bargaining agreements. Moreover, J. Wortley did not

testify to a legitimate purpose for his actions. I conclude that a desire to avoid labor law obligations was a motivation for those actions.[12]

The Respondent argues at length that a finding of alter ego status is precluded by the Board's decision in *East Tennessee Packing Co*., supra. See Respondent's Brief at 23 ff. In that case, a company that packaged and placed its brand name on meat products manufactured by others was found not to be the alter ego of a defunct company that used the same brand name but had been engaged in slaughtering hogs, preparing fresh pork items and manufacturing a full line of bologna and other meat products. The circumstances relating to alter ego status in the instant case are dissimilar to those in *East Tennessee Packing* in most of the respects the Board found most telling there. For example, in *East Tennessee Packing* the majority of the original company was owned by a trust that had no ownership in the alleged alter ego and the decision explicitly distinguished cases, such as the instant one, where "both enterprises [are] either wholly owned by members of the same family or nearly totally owned by the same individual." 270 NLRB at 524. The decision in *East Tennessee Packing* also noted that the owner of the alleged alter ego was not the one who decided to discontinue the operations of the original company. This contrasts with the instant case, where J. Wortley made the decision to discontinue Liberty's operations and then organized, and through his wife funded, Trafford to continue Liberty's warehouse\fulfillment operation. In addition, the alleged alter ego in *East Tennessee Packing*: retained none of the original company's major customers; took little of its management team from the original company; began operating after a significant hiatus following the original company's closing; and rented only a small portion of the original company's facility. These important facts all diverge from those demonstrated in the instant case, and make clear that a different result is appropriate with respect to Liberty and Trafford than was called for in *East Tennessee Packing*.[13]

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[12] A desire to avoid labor law obligations may not have been the sole reason for J. Wortley's ceasing to operate as Liberty and creating Trafford. Indeed, it is not unlikely that another reason was a desire to go forward with the warehouse\fulfillment operation unencumbered by demands from Liberty's creditors. However, if a desire to evade labor law obligations is even one of the employer's reasons for forming a disguised continuance of its old company, that reason is still sufficient for purposes of the "motive" factor in the alter ego analysis. *Martin Bush Iron & Metal*, 329 NLRB at 124; *Michael's Painting, Inc.*, 337 NLRB 860 (2002), enfd. 85 Fed.Appx. 614 (9th Cir. 2004).

[13] Trafford also relies on the decisions in *Perma Coatings, Inc.*, 293 NLRB 803 (1989) and *P.J.Hamill Transfer Co*., 277 NLRB 462 (1985). I have considered those decisions, but neither affects my conclusion that Liberty and Trafford are alter egos. In *Perma Coatings*, the Board based its finding that two companies were not alter egos on, inter alia, the facts that the owner of the first company did not control the second company, and that the first company was operationally defunct when the second company was created. This contrasts with the instant case, where J. Wortley controlled both companies, and the record shows that Trafford began hiring employees while Manderfield was still trying to preserve the Liberty operation. Most of Liberty's equipment – the printing presses and so forth – were not sold until months after Trafford began operating, and there is no evidence that Liberty was ever dissolved as a corporate entity. Similarly, in *P.J. Hamill*, the Board found that alter ego status was not appropriate because there "were critical differences – e.g., in ownership, nature of operations, and customers." 277 NLRB at 462. It is not surprising that the Board declined to find alter ego status there, but the "critical differences" that were determinative in that case are absent here. Trafford had essentially the same ownership as Liberty, and substantially the same customers and operations as Liberty's warehouse\fulfillment operation. For these reasons, I reject the Trafford's contention that the decisions in *Perma Coatings* and *P.J. Hamill* warrant a finding that

Continued

Trafford and Liberty have substantially identical ownership, management/supervision, business purposes, operation, equipment, premises and customers. The record also shows that the decision to create Trafford was motivated by a desire to evade Liberty's responsibilities under the Act. I find that Trafford and Liberty are alter egos.[14]

B. Alleged Violations Of Section 8(a)(5) and (1) Of The Act

Trafford, as an alter ego, is viewed to be essentially the same entity as Liberty, and is bound not only to bargain with the incumbent unions, but also to follow the terms of the existing labor agreements between Liberty and the Unions. See *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259 n.5 (1974); *Concourse Nursing Home*, 328 NLRB 692 (1999). An alter ego enterprise violates Section 8(a)(5) and (1) by refusing to meet this bargaining obligation, or by failing to apply the terms of existing labor agreements to unit employees. *Standard Commercial Cartage, Inc.*, 330 NLRB at 14.

I turn first to the allegation that Liberty violated Section 8(a)(5) and (1) by failing to meet its bargaining obligations before ceasing operations, transferring assets to a creditor, and terminating the employment of individuals represented by the Unions on September 3. Given that J. Wortley subsequently used an alter ego to continue part of his Liberty operation, the cessation and surrender of assets amount to a partial closing of its business. The Board has held that an employer violates Section 8(a)(5) and (1) when it lays off employees and partially closes its facility "without prior notice to the Union and without having afforded it an opportunity to bargain with the [employer] with respect to the layoff or the effects of the layoff and partial closing." *American Medical Waste Systems*, 321 NLRB 680, 681 (1996).[15] In the instant case, the Respondents terminated bargaining unit employees and partially closed the business without prior notice to the Unions and without bargaining over the terminations or the effects of the terminations and the partial closure. The Respondents did not meet, or even attempt to meet, their bargaining obligations before taking these actions and have not argued that the changes were not mandatory subjects of bargaining.

For the reasons discussed above, I find that the Respondents violated Section 8(a)(5) and (1) of the Act by terminating bargaining unit employees and partially closing its business without prior notice to the Federation and the IUE and without bargaining over the effects of the termination and the partial closure.[16]

After the bargaining unit employees were terminated, the Respondents failed to honor many of their obligations to them under the existing collective bargaining agreements.

Liberty and Trafford are not alter egos.

[14] Given my finding that Trafford and Liberty are alter egos, it is not necessary to reach the question of whether the two entities also constitute a "single employer." In its brief, the General Counsel states that even if I find alter ego status the single employer question might "have implications for the remedy" in this case. The General Counsel does not, however, divulge what those implications might be, and none are apparent to me from the record.

[15] Although an employer is required to bargain concerning the effects of a partial closure on unit employees, it is not ordinarily required to bargain over the decision to effect a partial closure. *United Technologies Corp.*, 287 NLRB 198, 203 (1987), affd. 884 F.2d 1569 (2d Cir. 1989); *Central Mack Sales*, 273 NLRB 1268, 1277 (1984)

[16] I would still find these violations even had I concluded that Liberty and Trafford were not alter egos. These actions were taken over the period ending on September 3, when the enterprise was still operating as Liberty.

Specifically, the Respondents declined to provide the workers with severance pay or accrued vacation pay. The Respondent did not even pay the terminated employees for work they had already performed on September 1, 2, and 3.[17] Then, the Respondents re-employed a number of bargaining unit employees, but did so without regard to the contract provisions calling for seniority to be a factor in selecting employees for re-employment. The Respondents failed to provide the re-employed individuals with the wages, benefits, and terms and conditions of employment, to which bargaining unit employees were entitled under the contracts. Before effectively repudiating the collective bargaining agreements in this manner, the Respondents did not give the Unions notice or an opportunity to bargain. On September 10, Carmody told Testa that the new company would not recognize the Unions and on September 16, during a meeting with Testa, Zahorchak, and other union officials, Carmody expressed the view that the company had a right to hire employees without union representation and without regard to the recall provisions of the union contracts. During that meeting, and afterward by letter, Carmody informed the union officials that he would not accept grievances on behalf of the Respondents. Indeed, at the meeting he claimed that there was no company to file grievances with. The Respondents violated the Act by refusing to recognize and bargain with the incumbent unions, and by failing to apply the terms of the existing collective bargaining agreements to unit employees. See *Howard Johnson v. Detroit Local Joint Exec. Bd.*, supra, *Concourse Nursing Home*, supra, *Standard Commercial Cartage*, supra.

The Respondents argue that even if Trafford and Liberty are alter egos, they should not be required to honor the terms of the collective bargaining agreements because the Unions did not file grievances and pursue arbitration under those agreements. Given Carmody's refusal to accept grievances from the Unions, this contention is, to put it mildly, disingenuous, and I reject it. Compare *Budrovich Contracting Co.*, 331 NLRB 1333, 1344 (2000) (Board defers unfair labor practice proceeding pending arbitration only when, inter alia, the employer is willing to arbitrate.), enfd. 20 Fed.Appx. 596 (8th Cir. Oct 15, 2001). The Respondents also argue that the case should be dismissed because the collective bargaining agreements with the Unions expired as of January 31, 2004. This argument fails because the Respondents committed, or began committing, all of the unfair labor practices at issue prior to January 31, 2004. The Respondents cite no authority at all for the notion that they are somehow absolved from previously committed unfair labor practices by the subsequent expiration of the contracts. Such a result would be particularly at odds with the purposes of the Act under the circumstances of this case, since the Respondents' refusal to bargain precluded any possibility of negotiating new contracts or a further extension of the existing contracts.

I find that, beginning on or about September 3, the Respondents violated Section 8(a)(5) and (1) of the Act by: refusing to recognize and bargain with the incumbent unions; failing to provide terminated workers with severance pay, accrued vacation pay, and compensation to which those employees were entitled under the applicable collective bargaining agreements; failing to select the employees for re-employment in compliance with the collective bargaining agreements; setting wages, benefits, and terms and conditions of employment for the returning unit employees that were inconsistent with the collective bargaining agreements; and, changing unit employees' wages, benefits, and terms and conditions of employment without prior notice to the Unions and without affording the Unions an opportunity to bargain.

[17] The record evidence does not demonstrate that, as alleged in the complaint, the Respondents failed to pay the terminated employees health care benefits, security and protection plan benefits, and commissions required by the applicable contracts, or that the Respondent failed to properly remit funds to the employees' pension funds.

Conclusions of Law

1. Respondent Liberty and Respondent Trafford are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Federation and the IUE are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents Liberty and Trafford are alter egos.

4. The Respondents violated section 8(a)(5) and (1) of the Act by: terminating bargaining unit employees and partially closing its business without prior notice to the Federation and the IUE and without bargaining over the effects of the termination and the partial closure; refusing to recognize and bargain with the Federation and the IUE; failing to provide terminated unit employees with severance pay, accrued vacation pay, and compensation to which those employees were entitled under the existing collective bargaining agreements; failing to select the employees for re-employment in compliance with the collective bargaining agreements; setting wages, benefits, and terms and conditions of employment for the returning unit employees that were inconsistent with the collective bargaining agreements; changing unit employees' wages, benefits, and terms and conditions of employment without prior notice to the Unions and without affording the Unions an opportunity to bargain.

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist from those practices and to take certain affirmative action designed to effectuate the policies of the Act. With respect to those employees who the Respondents did not re-employ for the resumed warehouse\fulfillment operation, but who would have been re-employed had the selection provisions of the collective bargaining agreements been followed, I find that a full backpay remedy is appropriate from the dates on which those individuals would have been re-employed. Except for that group, the limited backpay remedy described in *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968) is appropriate for the employees who the Respondents terminated as a result of the partial closure of its business. This limited remedy, rather than full backpay, is appropriate because those terminations were the direct result of the partial closure and the Respondents did not have an obligation to bargain over the partial closure, but only over its effects.[18] *Pan American Grain Co.*, 343 NLRB No. 47, slip op. at 1 (2004); *Kathleen's Bakeshop, LLC*, 337 NLRB 1081, 1082 (2002), enfd. 2003 WL 22221353 (2d Cir. 2003). Thus, I will recommend that the Respondents be required to pay the terminated employees backpay at the rate of their normal wages when last in the Respondents' employ from 5 days after the date of this Decision and Order until the occurrence of the earlier of the following conditions: (1) the date the Respondents bargain to agreement with the Unions on those subjects pertaining to the effects of the terminations and the partial closing of its business on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the union representing the employee to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondents' notice of their desire to bargain with the union; or (4) the subsequent failure of the union representing the employee to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he or she would have earned as wages from September 4, 2003, the date their terminations became effective, to the time he or she secured equivalent

[18] See footnote 15, supra.

employment elsewhere, or the date on which the Respondents shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than what these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondents' employ. See *Transmarine*, supra. All backpay provided by my recommended order should be reduced by the amount of net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and increased by interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondents must reimburse employees for any loss of wages and benefits because of Respondent's failure to apply the terms and conditions of the collective-bargaining agreement in manner prescribed in *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), plus interest as computed in accordance with *New Horizons for the Retarded*, supra.

I will also recommend that an appropriate Notice to Employees not only be posted at the facility, but also be mailed to each of the terminated employees who has not been re-employed. This is necessary since the terminated employees are unlikely to have an opportunity to view a Notice posted in the Respondents' facility. See *WestPac Electric*, 321 NLRB 1322 (1966) ("[i]t is well established that the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct); see also *Maramont Corp.*, 317 NLRB 1035, 1037 (1995) (the Board has broad discretion to fashion a "just remedy").

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[19]

ORDER

The Respondents, Liberty Source W, LLC and its alter ego, Trafford Distribution Center, Trafford, Pennsylvania shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Federation of Independent Salaried Unions (the Federation) and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO (the IUE), as the exclusive representatives of its employees in the appropriate units with respect to wages, hours, working conditions, or other terms and condition of employment, and refusing to honor the collective bargaining agreements applicable to employees in those units.

(b) Terminating unit employees and partially closing its facility without first notifying the appropriate union or unions and offering an opportunity to bargain over the effects of the terminations and the partial closure.

(c) Refusing to provide terminated unit employees with severance pay, accrued vacation pay, and compensation to which those employees are entitled under the existing collective bargaining agreements.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Failing to select the employees for re-employment in the manner set forth by the collective bargaining agreements.

(e) Setting wages, benefits, and terms and conditions of employment for the returning unit employees that are inconsistent with the terms of the collective bargaining agreements.

(f) Changing unit employees' wages, benefits, and terms and conditions of employment without prior notice to the appropriate union or unions and without affording an opportunity to bargain.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Federation as the exclusive representative of the employees in the Federation bargaining unit concerning terms and conditions of employment.

(b) On request, bargain with the IUE as the exclusive representative of the employees in the IUE bargaining unit concerning terms and conditions of employment.

(c) Reinstate all unit employees whom the Respondents did not select for re-employment when the Respondents resumed the warehouse\fulfillment operation in September 2003, but who would have been offered re-employment had the Respondents selected employees in accordance with the applicable collective bargaining agreement provisions. Make all such employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' failure to select them for re-employment in the manner set forth in the remedy section of the decision.

(d) Bargain with the Federation and the IUE over the effects on unit employees of the September 2003 employee terminations and the partial closure of its operations.

(e) Pay limited backpay to the unit employees terminated in September 2003 as a result of the partial closure of the operation in the manner set forth in the remedy section of this decision.

(f) Provide the unit employees terminated in September 2003 with the benefits to which they are entitled under the applicable collective bargaining agreements, including severance pay, accrued vacation pay, and compensation for work performed from September 1 to 3, 2003, in the manner set forth in the remedy section of this decision.

(g) Provide unit employees working for the Respondents after September 3 with wages, benefits, and terms and conditions of employment that are consistent with the terms of the collective bargaining agreements, and make such employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' failure to adhere to the collective bargaining agreements since September 3, 2003, in the manner set forth in the remedy section of this decision.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored

in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at their facility in Trafford, Pennsylvania, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondents' authorized representative(s), shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. The Respondents shall also mail a copy of the notice to all employees in the units represented by the Federation and the IUE who were employed by the Respondents at the Trafford, Pennsylvania facility as of September 2, 2003. The notice shall be mailed to the last known address of each of these employees after being signed by the Respondents' authorized representative(s).

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., November 24, 2004.

PAUL BOGAS
Administrative Law Judge

[20] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize and bargain with the Federation of Independent Salaried Unions (the Federation) and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO (the IUE), as the exclusive representatives of their employees in the appropriate units with respect to wages, hours, working conditions, or other terms and condition of employment.

WE WILL NOT refuse to honor the collective bargaining agreements applicable to you.

WE WILL NOT terminate you or partially close our facility without first notifying the appropriate unions and offering an opportunity to bargain over the effects of the terminations and the partial closure.

WE WILL NOT refuse to provide terminated unit employees with severance pay, accrued vacation pay, and compensation to which those employees are entitled under the existing collective bargaining agreements.

WE WILL NOT select employees for re-employment in a manner other than that required by the collective bargaining agreements.

WE WILL NOT set wages, benefits, and terms and conditions of employment for returning unit employees that are inconsistent with the terms of the collective bargaining agreements.

WE WILL NOT change your wages, benefits, and terms and conditions of employment without prior notice to the appropriate union or unions and affording an opportunity to bargain.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Federation as the exclusive representative of the employees in the Federation unit concerning terms and conditions of employment.

WE WILL, on request, bargain with the IUE as the exclusive representative of the employees in the IUE unit concerning terms and conditions of employment

WE WILL reinstate all unit employees who we did not select for re-employment when we resumed the warehouse\fulfillment operation in September 2003, but who would have been offered re-employment had we selected employees in accordance with the applicable collective bargaining agreement provisions. In addition, WE WILL make all such employees whole for any loss of earnings and other benefits suffered as a result of our failure to select them for re-employment.

WE WILL bargain with the Federation and the IUE over the effects on unit employees of the September 2003 employee terminations and the partial closure of our operations.

WE WILL pay limited backpay to the unit employees terminated in September 2003 as a result of the partial closure of our operation.

WE WILL provide the unit employees terminated in September 2003 with the benefits to which they are entitled under the applicable collective bargaining agreements, including severance pay, accrued vacation pay, and compensation for work performed from September 1 to 3, 2003.

WE WILL provide unit employees working for the Respondents after September 3, 2003, with wages, benefits, and terms and conditions of employment that are consistent with the terms of the collective bargaining agreements, and make such employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' failure to adhere to the collective bargaining agreements.

LIBERTY SOURCE W, LLC AND/OR
TRAFFORD DISTRIBUTION CENTER
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1000 Liberty Avenue, Federal Building, Room 1501, Pittsburgh, PA 15222-4173

(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.